***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

ORIGINAL

& proof of service

76-1503

To be argued by
JESSE BERMAN

B
P&S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 76-1503

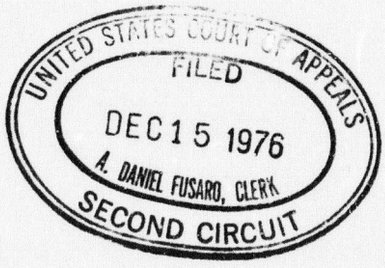
RAUL ESTREMERA, :

Appellant. :

----------X

BRIEF FOR APPELLANT

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.




JESSE BERMAN
Attorney for Appellant
351 Broadway
New York, New York 10013
[212] 431-4600

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES, CONT.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, :

Appellee, :

-against- :

RAUL ESTREMERA, :

Appellant. :

----------X

## ISSUES PRESENTED

1. Whether to deny appellant's Rule 35 motion without ordering the latest Bureau of Prison's evaluative reports was to decide that motion without a proper factual basis and was thus a denial of due process and an abuse of discretion.

2. Whether to summarily deny appellant's motion to reduce sentence, thereby letting stand a sentence the terms of which prevented the parole board from considering appellant for 5 years and 8 months, despite the claim that appellant had already completed all prescribed vocational training and character reform, constitutes cruel and unusual punishment.

## STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from an order of the United States District Court for the Southern District of New York (Duffy, J.), dated October 12, 1976, denying, without a hearing, appellant's motion, pursuant to Rule 35 of the Federal Rules of Criminal Procedure,

a) to reduce the seventeen (17) year sentence imposed on appellant herein on June 24, 1975, and

b) to direct the Bureau of Prisons to transmit to the District Court (prior to the determination of the Rule 35 motion) all records, progress reports, evaluations, and recommendations in their possession relating to appellant Raul Estremera for the period from June 24, 1975, until the present, including specifically the most recent evaluations and progress reports, and

c) to hold a hearing on the motion, at which appellant would have offered witnesses, exhibits and oral argument in support of his motion, and

d) to order the presence of appellant at said hearing, and

e) to allow a reasonable period of time for the above-mentioned prison records to be received by the District Court before deciding the motion, and

f) to consider awaiting disposition of the case of the co-defendant Victor Cumberbatch before deciding appellant's

Rule 35 motion, and

g) to specifically consider resentencing appellant under 18 U.S.C. §4205(b)(2), and

h) to allow appellant a reasonable amount of time in which to submit additional documentation in support of the motion.

Timely notice of appeal was filed, and this Court, on November 8, 1976, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently in the Federal Penitentiary in Steilacoom, Washington, serving the seventeen (17) year sentence pursuant to the judgment in this case.

B. Statement of Facts

1) Procedural History

Appellant was convicted, in the United States District Court for the Southern Listrict of New York (Duffy, J.), on June 24, 1975, after trial by jury, of the crimes of bank robbery, bank larceny and armed bank robbery [18 U.S.C. §2113 (a), (b), and (d)], and was sentenced to seventeen (17) years imprisonment.

On February 2, 1976, this Court affirmed that judgment. United States v. Estremera, 531 F. 2d 1103 (2d Cir. 1976).

On May 19, 1976, the United States Supreme Court denied appelant's petition for a writ of certiorari.

On September 15, 1976, appellant made a timely motion, before Judge Duffy, pursuant to Rule 35 of the Federal Rules of Criminal Procedure,

a) to reduce the seventeen (17) year sentence imposed on appellant herein on June 24, 1975, and

b) to direct the Bureau of Prisons to transmit to the District Court (prior to the determination of the Rule 35 motion) all records, progress reports, evaluations, and recommendations in their possession relating to appellant Raul Estremera for the period from June 24, 1975, until the present, including specifically the most recent evaluations and progress reports, and

c) to hold a hearing on the motion, at which appellant would have offered witnesses, exhibits and oral argument in support of this motion, and

d) to order the presence of appellant at said hearing, and

e) to allow a reasonable period of time for the above-mentioned prison records to be received by the District Court before deciding the motion, and

f) to consider awaiting disposition of the case of the co-defendant Victor Cumberbatch* before deciding appellant's motion, and

g) to specifically consider resentencing appellant under 18 U.S.C. § 4205(b)(2), and

* The instant indictment was dismissed against Cumberbatch on December 13, 1976, by Judge Palmieri, because of the government's failure to comply with the Interstate Agreement on Detainers, 18 U.S.C. App.

h) to allow appellant a reasonable amount of time in which to submit additional documentation in support of the motion.*

2) The Original Sentence

Judge Duffy gave appellant virtually the same, identical, eighteen (18) year sentence which he had previously imposed on the other two co-defendants (Monges and Washington) who were convicted in this case.**

Appellant's prior record was limited to one misdemeanor conviction, for mischief.

He had (and still has) a wife and three young children.

The presentence report stated that he had "adjusted well in the community," and it recommended a sentence of between 4 1/2 and 11 1/4 years and the possibility of sentence under 18 U.S.C. §4208(a)(2).***

Counsel brought several facts to Judge Duffy's attention at the time of sentencing, and the truth of those assertions on the part of counsel was never contested: Appellant, who was trained in the nutrition field, had run breakfast programs in Brooklyn and on the West Coast, and had developed and led

---

* The entire text of appellant's Rule 35 motion, including the exhibits attached thereto, is reproduced in appellant's Appendix, at A-14 through A-28.

** Appellant was technically sentenced to seventeen (17) years imprisonment, after Judge Duffy gave him credit for the year he had already served in Canada awaiting the government's commencement of extradition proceedings. See minutes of sentence, June 24, 1975, at S. 26.

*** Now renumbered as §4205(b)(2).

drug-therapy programs. Thousands of residents of appellant's Ocean Hill-Brownsivlle community and numerous prominent citizens* had sent a petition to Judge Duffy urging that appellant be speedily returned to the community.

Judge Duffy ignored all that was said about appellant as a person, and concentrated solely on the nature of the offense: In his remarks at the time he imposed the sentence, Judge Duffy virtually avoided mentioning anything about appellant, and he stated that he was concerned with only "one particular incident, and that incident was the bank robbery" (S. 25).

In sentencing appellant to seventeen (17) years imprisonment, Judge Duffy denied appellant's request to impose the sentence under 18 U.S.C. § 4208 (a)(2).

On his appeal to the Court from the judgment, appellant argued that Judge Duffy,

> ...in ignoring the differences between appellant and his co-defendants, the recommendations in the pre-sentence report and the individual positive and mitigating factors in appellant's history and character, and in considering only the fact of the bank robbery in imposing virtually identical sentences on all three

---

* These included a State Senator, two clergymen and a number of administrators of anti-poverty programs in appellant's community.

> defendants employed a fixed and mechanical approach to sentencing, requiring this Court to invalidate the sentence.
>
> Appellant's Brief, POINT VII, United States v. Estremera, supra.

In affirming the judgment, this Court said only the following about the sentence:

> Nor did the 17-year sentence fall outside the trial judge's legitimate discretion, in light of appellant's participation in the armed bank robbery. Indeed, two of his coparticipants who entered pleas of guilty solely to Count 1 of the indictment were each sentenced to 18-year terms, and a panel of this court summarily affirmed the validity of that sentence against an attack similar to this one.
>
> United States v. Estremera, supra, 531 F. 2d at 1113 (citations omitted).

3) The Rule 35 Motion

The gist of appellant's Rule 35 motion was that, since the imposition of sentence, there had been

> ...positive changes in defendant's character, attitudes toward authority, adaptability to society, level of maturity, respect for law and the like, all of which happened within the walls of federal prisons and all of which can be officially documented only through official records of those prisons, records which now remain in the custody of prison officials.
>
> (A-15-16, emphasis added)

Appellant did manage to obtain some evaluative records from the prison authorities, and these were appended to the Rule 35 motion (A-18 through A-27), but because most of the records, progress reports, evaluations and recommendations concerning appellant, covering a period of a year and three months since the sentence date, remained (and still remain) in the possession of the Bureau of Prisons, appellant specifically asked Judge Duffy

> to direct the Bureau of Prisons to transmit [such records] to this Court (prior to the determination of the within Rule 35 motion),... including specifically the most recent evaluations and progress reports, and
>
> * * *
>
> to allow a reasonable period of time for the above-mentioned prison records to be received by this Court before decidings this motion.
>
> (A-14)

Among the materials which appellant had succeeded in obtaining from the Bureau of Prisons, and which were attached to the Rule 35 motion, were the following:

1) A Bureau of Prison "Progress Report, dated May 17, 1976, which stated that appellant "has adjusted favorably to Lewisburg," "has presented no adjustment problems," "has maintained a clear conduct record," "completed the vocational ...course," "received a certificate for favorable completion

of the program involving 840 hours of on the job training," "related favorably to his quarters assignment," "reports from his quarters officer in the H semi-house dormitory reflect that he is one who responds to institution routines and regulations without resentment to authority," "is a willing worker who performs assigned duties in a conscientious manner," "has consistently been polite and cooperative in his dealings with staff members," and "does not appear to be one who is firmly oriented to a criminal value system" (A-18-19).

2) A Bureau of Prisons "Institutional Memoramdum," dated October 2, 1975, which authorized a 'meritorious award" to appellant for work he had done in the hospital at the Atlanta Penitentiary (A-20).

3) An institutional memo, dated September 25, 1975, which granted appellant the status of medium security custody and determined that his rehabilitation program should consist of vocational training and a General Education Degree (A-21).

4) A letter of recommendation, dated October 15, 1975, signed by the dentist and the chief dental officer at Atlanta, praising appellant's work as dental assistant at Atlanta, and "highly" recommending appellant for acceptance into the dental laboratory technician course at Lewisburg (A-22).

5) A recommendation form, dated March 31, 1976, recommending that appellant be granted both meritorious pay and meritorious good time, and citing appellant's

"accuracy, workmanship, dependability," the fact that appellant was "more dependable and trustworthy than others," and was an "excellent worker" (A-23-24).

6) A recommendation form, dated April 1, 1976, stating that appellant was "a very excellent worker" and that he "gets along very well with other inmates and as well with staff members" (A-25).

7) A recommendation, dated August 17, 1976, again describing appellant's work habits as "excellent," "his conduct on the job is above average," "his attitude toward staff and other inmates has been very good, and he shows no resentment toward authority" (A-26).

8) A "Certificate of Achievement," dated April 1, 1976, evidencing appellant's satisfactory completion of a vocational course at Lewisburg (A-27).

Appellant also attached to his motions a New York Times article, dated June 3, 1976, in order to contrast his own attitude and behavior while at Lewisburg with "what was generally going on at Lewisburg at the same time." The article reported that the Bureau of Prisons was investigating "the stabbing deaths of four inmates [at Lewisburg] in the last five months" and that there had been "seven killings in the last two years" at Lewisburg (A-28).

Appellant stressed that:

> We also urge the Court to find that Mr. Estremera has already successfully completed all the vocational training which had been

> prescribed for him, that he had already demonstrated the proper attitude and the fact that he has been adequately rehabilitated, and that his continued incarceration would be solely for punitive reasons.
>
> Because of the length of the sentence imposed and the fact that, under the present sentence, Mr. Estremera cannot even see the parole board for another four (4) years, we urge this Court to hold a new sentence hearing after receipt from the Bureau of Prisons of the evaluative reports which we urge the Court to order.
>
> (A-16, emphasis added)

The government never submitted any opposition to appellant's Rule 35 motion.

Judge Duffy never sought to order any reports from the Bureau of Prisons. He simply endorsed the motion, "Motion denied."

## ARGUMENT

### POINT I

TO DENY APPELLANT'S RULE 35 MOTION WITHOUT ORDERING THE LATEST BUREAU OF PRISONS EVALUATIVE REPORTS WAS TO DECIDE THAT MOTION WITHOUT A PROPER FACTUAL BASIS AND WAS THUS A DENIAL OF DUE PROCESS AND AN ABUSE OF DISCRETION.

Rule 35 gives to a district court the power to reduce a sentence which was legal and perhaps appropriate when imposed, but which has become inappropriate because of new information and changed circumstances. United States v. Ellenboge., 390 F. 2d 537, 543 (2d Cir. 1968); United States

v. Ginsberg, 398 F. 2d 52, 57 (3d Cir. 1968) [en banc].

> Rule 35 is intended to give every conviceted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim.
>
> United States v. Ellenbogen, supra, 390 F. 2d at 543.

This notion, that a sentencing judge should be receptive to having "any further information about the defendant... presented to him in the interim," is underscored by the fact that Congress, in 1966, extended the Rule 35 period from 60 to 120 days, specifically in order to give defendants additional time in which to gather evidence in support of a motion to reduce sentence:

> The second sentence [of Rule 35] has been amended to increase the time within which the court may act from 60 days to 120 days. The 60-day period is frequently too short to enable the defendant to obtain and file the evidence, information and argument to support a reduction of sentence.
>
> Notes of the Advisory Committee on Rules, Fed. Rules Cr. Proc., Rule 35, 18 U.S.C.A., at 344.

The Advisory Committee notes also recognized that there are particular additional problems affecting the incarcerated

defendant who, like appellant, is already serving his sentence in a distant institution at the time he wants to document his Rule 35 motion:

> Especially where a defendant has been committed to an institution at a distance from the sentencing court, the delays involved in institutional mail inspection procedures and the time required to contact relatives, friends and counsel may result in the 60-day period passing before the court is able to consider the case.
>
> (Id.)

Appellant's problem in documenting the factual basis for his Rule 35 motion, i.e., in proving the changes in his character, attitude toward authority, and vocational training, was very much the same as the problems described by the Advisory Committee: Because appellant had been continuously in prison since the date when sentence was originally imposed,* whatever proof he might seek to offer about himself as to new information and changed circumstances would necessarily have to come in the form of documentation maintained by the Bureau of Prisons. Appellant, in his motion, was claiming essentially that he had developed into being a model prisoner, completely rehabilitated, both in terms of his vocational training and his having achieved an attitude of respect for authority and for the law.

---

* And, indeed, for a year and a half prior to that sentence date as well.

But in order to be able to persuade Judge Duffy of the magnitude of these changes, and to convince Judge Duffy of the sincerity and permanence of the changes in appellant's character, appellant needed the latest evaluative reports prepared and kept by the Bureau of Prisons. By refusing to order the Bureau of Prisons to send him those reports, Judge Duffy denied appellant's motion to reduce sentence without any proper factual basis, thereby denying appellant due process. By failing to seriously consider the efforts appellant had made to rehabilitate himself, Judge Duffy effectively declined to exercise his descretion, and this failure to properly determine whether a reduction was warranted requires that the matter be remanded for reconsideration of the Rule 35 motion after first requiring production of the latest Bureau of Prisons evaluative reports.

Several recent decisions support appellant's claim on this appeal.

In United States v. Robin, _____ F. 2d _____ (2d Cir. October 15, 1976), slip op. 5829, the sentence itself was within legal limits, but this Court vacated the sentence and remanded for resentencing. Among the factors underlying that decision in Robin, supra, were the fact that the sentencing court refused to consider evidence offered by the defendant on the issue of sentence (slip op. at 5832):

> We have held that a defendant must be permitted to state his version of the facts to the court ... In appropriate circumstances, this may mean that a defendant will be permitted to submit affidavits or documents, supply oral statements, or even participate in an evidentiary hearing; alternatively, further corroboration of sentencing data may be required. ... [A] court's failure to take appropriate steps to ensure the fairness and accuracy of the sentencing process must be held to be plain error and an abuse of... discretion.
>
> Robin, supra, at 5835-36.

It is certainly just as important that a defendant be permitted to present his proof on a Rule 35 motion as it is on an original sentencing, for in a Rule 35 application the defendant has a heavy burden of proof to meet if he is to succeed in persuading a judge that an already-imposed sentence should now be changed. Yet in the instant case it would appear that Judge Duffy deprived appellant of the only possible means of meeting his burden of proof: Instead of waiting for the government's response and instead of ordering production of the reports which appellant claimed would support his positon, the Court ignored the offer of proof and summarily disposed of the motion with a two-word endorsement ("Motion denied"), refusing to allow any documentary proof or even oral argument on the motion.

And, considering the fact that appellant (who was a first offender with strong family ties and substantial roots

in his community) had been originally sentenced by Judge Duffy to a seventeen year sentence with no possibility of even seeing the parole board until after 5 years and eight months, Judge Duffy should have been,

> ...still more sensitive to the need for a careful inquiry into the accuracy of the information before it.
>
> Robin, supra, at 5840.

Here, as in Robin, "the Court's failure to address any serious consideration to appellant's ...offer of proof" was an abuse of discretion.

In United States v. Stein, _____ F 2d _____ , (2d Cir. October 22, 1976), slip op. 211, this Court vacated a sentence and remanded for resentencing because, among other factors, the sentencing court

> ... failed to permit appellant and his counsel to be heard when they attempted immediately after imposition of the sentence to address the court... .
>
> Stein, supra, at 212, emphasis added.

In the instant case, Judge Duffy's refusal to order production of the evaluative reports was, in effect, denial to appellant of any sort of meaningful opportunity to be heard, and was thus a denial of due process.*

---

* The withholding of the Bureau of Prisons' latest evaluative reports on appellant is very much akin to the withholding of the supplemental probation report in Stein, supra, at 218.

Nor did Judge Duffy make any findings of fact with respect to the changes which appellant had claimed in his motion; nor could he have properly made such findings without the latest evaluative reports. All that appellant has in terms of an order from which to appeal is Judge Duffy's "cryptic endorsement" (Stein, supra, at 22), "Motion denied."

Similarly, in United States v. Malcolm, 432 F. 2d 809, 815 (2d Cir. 1970), this Court vacated a sentence on the ground that the sentencing judge denied defense counsel the opportunity to present material information bearing on the sentence.

If an imprisoned defendant is to be denied the means to prove his claim that he merits a Rule 35 reduction, than the availability of Rule 35 relief will be limited to those defendants who are rich enough to stay out on bail, thus accumulating all the proof of their changed circumstances outside of prison, and to those defendants who make a late decision to become government witnesses or informers, thus relying on their supposed adversary to bring in the proof of their "changed circumstances."

Federal appellate courts have affirmatively accepted the responsibility for setting standards for imposing sentence as part of their supervisory powers, and for directing the attention of district judges to the factors which should be considered in determining the sentence to be imposed. Yates v. United States, 356 U.S. 363, 366-367 (1958); North Carolina

v. Pearce, 395 U.S. 711, 726 (1969); United States v. Schwarz, 500 F. 2d 1350 (2d Cir. 1974); United States v. Coke, 404 F. 2d 836 (2d Cir. en banc, 1968); Coleman v. United States, 357 F. 2d 563 (D.C. Cir. en banc, 1965); United States v. Wiley, 278 F. 2d 500 (7th Cir. 1960); United States v. Moody, 371 F. 2d 688, 693-694 (6th Cir. 1967).

Since the Court below's decision, based upon a denial of appellant's basic right to document and substantiate the claims in his motion, is erroneous and counter to the very purpose and intent of Rule 35, this Court should vacate the order appealed from, and should remand the matter to the District Court with the direction that that Court give appropriate weight to the manifestly substantial evidence of changed circumstances which appellant has presented. See United States v. Moody, supra, 371 F. 2d at 693-694; Lee v. United States, 344 F. 2d 566 (D.C. Cir. 1965); Wilson v. United States, 335 F. 2d 982, 984 (D.C. Cir. 1963); Scarbeck v. United States, 317 F. 2d 546, 569 (D.C. Cir. 1962); United States v. West Coast News Co., 357 F. 2d 855, 863-866 (6th Cir. 1966).

Since Judge Duffy has made it clear that, when it comes to the sentence to be imposed herein, he is interested only in the fact that the crime was one of bank robbery, and that he is not at all interested in whether or not there have been material changes in appellant's character and circumstances, or in permitting appellant to prove the facts of such changes, this Court, upon reversing the order appealed from, should

direct that appellant's Rule 35 application be heard by a different judge. United States v. Stein, supra, at 227; United States v. Robin, supra, at 5841; United States v. Schwarz, supra, 500 F. 2d at 1352; United States v. Rosner, 485 F. 2d 1213, 1231 (2d Cir. 1973); United States v. Brown, 470 F. 2d 285, 288-289 (2d Cir. 1972).

## POINT II

TO SUMMARILY DENY APPELLANT'S MOTION TO REDUCE SENTENCE, THEREBY LETTING STAND A SENTENCE THE TERMS OF WHICH PREVENTED THE PAROLE BOARD FROM CONSIDERING APPELLANT FOR 5 YEARS AND 8 MONTHS, DESPITE THE CLAIM THAT APPELLANT HAD ALREADY COMPLETED ALL PRESCRIBED VOCATIONAL TRAINING AND CHARACTER REFORM, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The seventeen-year sentence originally imposed by the Court was within the limits allowed by statute, as was the Court refusal, at the time of sentence, to sentence appellant under 18 U.S.C. § 4208(a)(2).

But in his Rule 35 application, appellant made the claim, which was never disputed or rebutted, and which appellant offered to prove, that he had completed all prescribed vocational training and character reform (A-15 through A-27). Appellant asked Judge Duffy to reduce his sentence, or at least to resentence him under 18 U.S.C. § 4205(b)(2). (A-15).

It is respectfully submitted that Judge Duffy's effective reaffirmation that appellant had to serve 5 years and 8 months in prison before he could ever see the parole b- rd, despite the fact of appellant's offer of proof that he had completed all prescribed rehabilitation, constitutes an imposition of a cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238 (1972).

> The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serve any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.
>
> Furman, supra, 408 U.S. at 282 [Brennan, J.]

The punishment which Judge Duffy refused to reconsider was "unusually severe" : A seventeen-year sentence for bank robbery is well above the average sentence imposed in the Southern District of New York for the same crime. It is especially severe in the case of appellant, whose only prior conviction was for the misdemeanor of mischief, and for a bank robbery in which no hostages were taken, no weapons discharged and in which appellant himself did not physically injure anyone.

There is a "strong probability" that the punishment here was "inflicted arbitrarily": Judge Duffy considered only the offense, and not the individual defendant. He gave essentially identical sentences to all three co-defendants. He arbitrarily denied appellant's Rule 35 motion without ever letting appellant prove his claims, without any findings of fact, without any opinion, and without ever stating why he would not, under § 4205(b)(2), let the parole evaluate appellant's apparent rehabilitation.

Contemporary society certainly rejects the notion that sentencing is solely for punishment. Yet the conclusion is unescapable that Judge Duffy imposed the sentence herein, with the 5 year and 8 month moratorium on parole consideration and the cavalier denial of Rule 35 consideration, for no reason other than to punish.

Nor can it be said that a more humane sentence upon the Rule 35 application, such as resentencing pursuant to 4205(b)(2), would serve penal purposes any less effectively in the instant case.

Appellant has been incarcerated continuously since January 1974. Judge Duffy's arbitrary denial of appellant's very substantial Rule 35 application renders continuation of appellant's sentence, without the possibility of parole consideration for another four years, despite appellant's uncontested rehabilitation, cruel and unusual punishment.

The order should be reversed and the matter remanded with the direction that it be heard by a different judge.

## CONCLUSION

THE ORDER SHOULD BE VACATED AND THE MATTER REMANDED FOR REVIEW OF THE CHANGED CIRCUMSTANCES IN ORDER TO DETERMINE WHETHER A REDUCTION OF SENTENCE IS WARRANTED AND WHETHER APPELLANT SHOULD BE SENTENCED UNDER 18 U.S.C. § 4205 (b)(2). MOREOVER, THE MATTER SHOULD BE ASSIGNED TO A DIFFERENT JUDGE.

Respectfully submitted,

JESSE BERMAN
Attorney for Appellant
351 Broadway
New York, New York 10013
[212] 431-4600

December, 1976.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK )
) ss.:
COUNTY OF New York )

NANCY JAINCHILL, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 10 Leonard St., NY, NY 10013

On December 14, 1976, served the within appellant's Brief

upon Robert B. Fiske, Jr. attorney(s)

for appellee in this action, at

1 St. Andrews Plaza, NY NY 10007

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in - post office- official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Nancy Jainchill

Sworn to before me on
December 14, 1976.

[illegible]
Notary Public, State of New York
[illegible]
Qualified in New York County
Commission Expires March 30, 1978